

PR#9833

SMITHEE, DEREK

4/16/2009

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,  
Plaintiff,

vs. CASE NO. 05-CV-00329-GKF SAJ

TYSON FOODS, INC., et al.,  
Defendants.

DEPOSITION OF DEREK SMITHEE  
TAKEN ON BEHALF OF THE DEFENDANTS  
ON APRIL 16, 2009, BEGINNING AT 9:00 A.M.  
IN OKLAHOMA CITY, OKLAHOMA

APPEARANCES:

On behalf of the PLAINTIFF:

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Mr. Dan Lennington  
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On behalf of the DEFENDANT-CARGILL, INC. AND CARGILL  
TURKEY PRODUCTION:

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REPORTED BY: Laura L. Robertson, CSR, RPR

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(APPEARANCES CONTINUED)

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1 MR. LENNINGTON: Dan Lennington for the  
2 State.

3 MR. HAMMONS: Trevor Hammons for the State  
4 of Oklahoma.

5 MS. HILL: Theresa Hill for Cargill, Inc.  
6 and Cargill Turkey Production, LLC.

7 MS. LONGWELL: Nicole Longwell on behalf of  
8 Peterson Farms.

9 MS. LLOYD: Jennifer Lloyd for George's.  
10 WHEREUPON,

11 DEREK SMITHEE,  
12 after having been first duly sworn, deposes and says  
13 in reply to the questions propounded as follows,  
14 to-wit:

15 DIRECT EXAMINATION

16 BY MS. HILL:

17 Q. Mr. Smithee, I know you have been deposed a  
18 few times before, so I'm not going to go over the  
19 rules.

20 A. Remind me your first name, I forgot.

21 Q. My name is Theresa Hill.

22 A. Okay, Theresa.

23 Q. Nice to meet you today. The only rule I  
24 will mention, we don't have a video today, so we can  
25 take a break whenever you would like. If there is a

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1 CERCLA?

2 MR. LENNINGTON: Same objection.

3 THE WITNESS: Since I don't know how release  
4 is defined by CERCLA, I can't answer that question.

5 Q. The BUMP sampling program, does it attempt  
6 to assess a variety of sources of the constituents  
7 that are listed here on Exhibit No. 2, or compounds or  
8 metals?

9 MR. LENNINGTON: Object to the form.

10 Q. (BY MS. HILL) Let me try again and make it  
11 clear. Through BUMP do you attempt to assess the  
12 sources of the items listed here on Exhibit No. 2?

13 A. By source, do you mean where it originated  
14 before it entered the water column, or as it entered  
15 the water column, we do not.

16 Q. BUMP does not attempt to isolate or study or  
17 determine sources, is that what you're telling me?

18 A. Sometimes we are able to do that, but it is  
19 not a set up specifically for that purpose.

20 Q. And what is the purpose then of the BUMP  
21 sampling?

22 A. The purpose is to identify water quality  
23 problems and refine and provide new data information  
24 to help us fix those problems when they are  
25 identified.

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1 meeting standards.

2 When they do not meet standards, that  
3 triggers a TMDL.

4 Q. The BUMP report is part of your agency's  
5 federal reporting requirements?

6 A. That is correct.

7 Q. And please describe more specifically for  
8 the record what those federal reporting requirements  
9 are?

10 A. The Clean Water Act requires the state of  
11 Oklahoma to publish in essence two reports. One is  
12 the 305(b) report the other is a 303(d) list.

13 305(b) report is a -- my vernacular, a state  
14 of the state's waters, it is a report to congress  
15 outlining the general water quality of each individual  
16 state, territory or tribal area.

17 303(d) list is a list of the waters not  
18 meeting the state's water quality standards, and  
19 requiring a TMDL to restore those waters to meeting  
20 water quality standards and/or its antidegradation  
21 requirements.

22 Q. Thank you.

23 A. Oh, and those are required every two years.

24 Q. By the Clean Water Act?

25 A. That is correct. Actually the 305(b) is

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1 every five years, 303(d) is every two. But they have  
2 since consolidated and that is what is called the  
3 consolidated report and it is one big report and it is  
4 done every year.

5 Q. So the monitoring that we have discussed  
6 here for the BUMP and the reporting that goes along  
7 with that, that is not monitoring that's done in  
8 response to any particular event in the watershed?

9 MR. LENNINGTON: Object to the form.

10 Q. (BY MS. HILL) Is it? You may answer.

11 A. Some of it is.

12 Q. Tell me about that.

13 A. Prior to 1998, we had heard anecdotally the  
14 water quality in the Illinois River had deteriorated,  
15 but we did not have data to support or refute that  
16 anecdotal conclusion.

17 When we started monitoring with BUMP, Eureka  
18 in the first couple of years we did identify with data  
19 that it does in fact have some problems. So we  
20 increased our sampling frequency to determine, well  
21 what, how bad and extensive is this problem, where is  
22 it spatially located. If we could have contributed  
23 source, we would. And our data showed that the  
24 Illinois River did imperically have water quality  
25 problems, so we monitored it more frequently or for

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1 the substrate or in the water column, bacteria  
2 problems, do we know if there is a bacteria problem or  
3 not, how are we going to monitor for that. Additional  
4 enrichment issues, what is going on at Lake Francis,  
5 the Lake Francis, all of the Lake Francis stuff. So  
6 if it related to that, I included it. If it was just  
7 ordinary Scenic Rivers Commission meeting or just -- I  
8 did not count that.

9 Q. So Lake Francis, time spent addressing Lake  
10 Francis issues is included in line item number 5 here?

11 A. Correct.

12 Q. And so you didn't try to isolate your time  
13 by maybe the source of one of these water quality  
14 impacts here?

15 A. I did not.

16 Q. So this would -- this time fairly relates to  
17 all sources of water quality impacts?

18 A. That is fair. How do I respond, how much  
19 energy that I spent and time is money responding to  
20 problems at the Illinois River and its watershed are  
21 experiencing.

22 Q. Regardless of the cause of that problem?

23 A. That is correct sometimes we didn't know at  
24 the time the cause of that problem. When you go to  
25 the doctor and you're sick, you don't always know why

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1 you're sick, you just know you're not feeling good.  
2 So you go to the doctor to try to find out why you're  
3 not feeling good.

4 A lot of this is we know the Illinois River  
5 is sick, we have got to try to figure out why it is  
6 sick.

7 Q. And this is a comprehensive category again  
8 that included addressing all types of sources?

9 A. Correct.

10 Q. And the meetings that we have described, the  
11 coordination and other work that we have described,  
12 that occur from 1995 through 2008?

13 A. And occur today and occur next week and  
14 occurred when I first came to work for the State of  
15 Oklahoma in 1984.

16 Q. And your claim here, is this a pre-1995  
17 through 2008 claim, or is it a 1995 through 2008  
18 claim?

19 A. It is a -- it's a 19 -- it's my recollection  
20 of 1995 and before, and then each year as I recollect  
21 and can document after that.

22 Q. What records did you look at for pre-1995?

23 A. The same, time sheets, calendars.

24 Q. How far back did you go?

25 A. As far back as my time sheets and calendars



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1 Q. And when you say release or potential  
2 release, does that include all potential discharges,  
3 whether they be from point sources or non-point  
4 sources?

5 A. Yes.

6 Q. You didn't try to distinguish any discharge  
7 from -- distinguish discharges from point sources and  
8 non-point sources?

9 A. Not for this purpose. That is done, but not  
10 by me.

11 Q. And you did not do it for the purpose of  
12 documenting the cost for the Oklahoma Water Resources  
13 Board cost claim here?

14 A. That's correct.

15 Q. And so if we go down to paragraph 2-A, the  
16 USGS work here, it is described in your declaration  
17 that's dated March 9, '09, but if I understand your  
18 testimony today, this sampling is not part of the  
19 state's cost claim?

20 MR. LENNINGTON: Object to the form.

21 THE WITNESS: That's generally true.

22 Q. (BY MS. HILL) Are there some exceptions to  
23 the generally?

24 A. Yes, there are.

25 Q. Please tell me what those are.

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1           A.     There was -- there was significant  
2     discussion and time spent on how you monitor for high  
3     flow sampling that we -- that may have been captured  
4     in my time here on 33 and 34.

5           Q.     Specifically would that have been captured  
6     in line item number 6 on page 34?

7           A.     Yes.

8           Q.     But other than some time that might be  
9     captured in line item number 6 on page 34, am I  
10    correct that there is no other claim for costs or any  
11    other expense associated with this high flow sampling  
12    done with the USGS?

13          A.     Not from my agency, that's correct.

14          Q.     And paragraph 2-B refers to the Illinois  
15    River probabilistic monitoring; is that correct?

16          A.     That is correct.

17          Q.     And is this the same item as item number 2  
18    on Exhibit 8 that was dropped from your list?

19          A.     It is.

20          Q.     And item number 2-C on your affidavit refers  
21    to the development of a new criterion for phosphorous  
22    in the Illinois River, and revising the use assessment  
23    protocols for phosphorous.

24                 Are those items included in the chart on  
25    page 33 and 34?

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1           A.     As 1 and 2.

2           Q.     Thank you. And 1 and 2 contain the total  
3 amount of the cost claim for those two items?

4           A.     It does.

5           Q.     Let's go to 2-D on your affidavit.

6           A.     Okay.

7           Q.     And this refers to the Clean Lakes Study.  
8 Is the Clean Lakes Study included on the charts at 33  
9 and 34?

10          A.     Yes.

11          Q.     Tell me where?

12          A.     Number 3.

13          Q.     Okay. And the total amount of the claim for  
14 the Clean Lakes Study is documented on charts at 33  
15 and 34 in line item number 3; is that correct?

16          A.     That's correct.

17          Q.     Paragraph 2-E on your affidavit refers to  
18 several projects relating to the Oklahoma/Arkansas  
19 Compact. Are those the projects that are listed under  
20 item number 4 on the charts at pages 33 and 34?

21          A.     They are.

22          Q.     And pages 33 and 34 again contain the total  
23 cost claim for those projects?

24          A.     That's correct.

25          Q.     Let's skip down to paragraph number 4 of

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1 your affidavit, and that is the BUMP that we have  
2 discussed, and those costs are described in Exhibit  
3 No. 2 and Exhibit No. 6?

4 A. Correct.

5 Q. And please describe for me any programs that  
6 are in place now that you are making any claim for  
7 that's related to -- let me start over.

8 Paragraph number 3 on your affidavit states,  
9 "OWRB plans on expending resources in the near future  
10 to address nutrient pollution in the Illinois River  
11 Watershed, including pollution resulting from  
12 phosphorous." Did I read that correctly?

13 A. Yes.

14 Q. Are you providing any documentation here of  
15 resources that are committed to addressing any  
16 nutrient pollution in the Illinois River Watershed?

17 A. We are not. They will occur, but we are  
18 not.

19 Q. Let's take a look -- do you intend to  
20 testify at trial about any future costs that may be  
21 referred to here in paragraph 3?

22 A. If asked.

23 Q. Are you prepared to tell me today what those  
24 future costs may be?

25 MR. LENNINGTON: Objection, outside the

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1 here today?

2 A. Yes.

3 Q. And if we go to paragraph number 2-A,  
4 Ms. Duncan describes costs incurred as part of the  
5 Ambient Trend Program. Is that the same Ambient Trend  
6 Monitoring Program that we have been discussing?

7 A. It is with the four metals, yes, or three  
8 metals.

9 Q. And what is the total amount of ODEQ's claim  
10 as it relates to the Ambient Trend Monitoring Program?

11 A. 14,400 and change.

12 Q. Ms. Duncan's declaration at 2-B describes  
13 the Oklahoma's Beneficial Use Monitoring Program, or  
14 the BUMP that we have been discussing. On ODEQ making  
15 any additional claim for costs in addition to the BUMP  
16 costs that we have discussed for OWRB already today?

17 A. They are not.

18 Q. Paragraph number 2-C addresses sampling that  
19 was done in association with development of a total  
20 maximum daily load study, and do you have any  
21 documentation here today that accounts for any costs  
22 associated with the TMDL study?

23 A. There is no cost being claimed for that  
24 work.

25 Q. So the total amount of the cost claim from

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1 ODEQ is the \$14,469.29; is that correct?

2 A. The total cost from the DEQ that I am  
3 speaking to today is 14,000. There may be something  
4 that Mark Derichsweiler or others have claimed. I  
5 can't speak to that.

6 Q. And sitting here today --

7 A. For Judy Duncan's affidavit, that's the  
8 total claim.

9 Q. And you're not able to document for us today  
10 or describe any costs that may have been associated  
11 with the TMDL study?

12 A. I am not.

13 MS. HILL: Let me take a real quick break.  
14 I think we can finish up in the next half an hour.  
15 But let me visit with Nicole and Jennifer here and see  
16 where we are.

17 THE WITNESS: Okay.

18 (Short break)

19 Q. (BY MS. HILL) All right, let's go back to  
20 the record and we are going to mark as Exhibit No. 9  
21 the remainder of the notes that you brought for us  
22 today. And the only thing that we haven't discussed  
23 already today in one form or another is this excerpt  
24 from Dr. Fisher's report.

25 Tell me, when did you receive that?

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1 I do like them to do that, because I want it  
2 to be a one stop report.

3 Q. You talked about briefly, well I guess in  
4 Exhibit 2, the table that was prepared that included  
5 the OWRB's response costs, do you recall that, page 33  
6 and 34?

7 A. Yes.

8 Q. And the first item that's listed on this  
9 exhibit is the .037 criterion development?

10 A. Uh-huh.

11 Q. Is that criterion limited to solely on the  
12 Illinois River Watershed?

13 A. No.

14 Q. What -- are there other rivers that are  
15 included that are governed by the standard within the  
16 state of Oklahoma?

17 A. Yes.

18 Q. What other rivers?

19 A. All six scenic rivers.

20 Q. So it is safe to say that that criterion  
21 applies to all scenic rivers within the state of  
22 Oklahoma?

23 A. That is correct, all six of them.

24 Q. And when you prepared these costs associated  
25 with this criterion for your deposition today, as

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1 illustrated on Exhibit 2, at pages 33 and 34, did you  
2 exclude any of the amounts that are indicated here  
3 because that criterion applied to more than just the  
4 Illinois River?

5 A. We did not.

6 Q. So basically all costs that the OWRB  
7 incurred in developing that criterion for the scenic  
8 rivers within the state of Oklahoma is attributed here  
9 to, in your response to the Illinois River?

10 A. When we developed .037, let me try to  
11 understand your question, Nicole.

12 Q. Sure?

13 A. When we promulgated the .037, we promulgated  
14 it for all scenic rivers, including the Illinois  
15 River. The Illinois River as the premier scenic river  
16 in the state was the primary focus, but the  
17 promulgation process captured all six of them.

18 Q. Okay. So you didn't divide it by six and  
19 attribute only a sixth of the cost -- excuse me, let  
20 me finish my question, I'm sorry, it gets real  
21 conversational and I understand but I want the record  
22 to be clear, and it is easier for Laura.

23 So you did not divide the total cost for  
24 developing this criterion by six since there were six  
25 scenic rivers, you just attributed it all to the



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1 Illinois, because it was the main scenic river that  
2 was -- that you were promulgated this criterion for;  
3 is that accurate?

4 A. Not quite.

5 Q. Okay. How is it not accurate?

6 A. We developed the criterion in response to  
7 problems that the scenic rivers were experiencing,  
8 primarily the Illinois River, and the costs associated  
9 with promulgating that criteria would have been  
10 functionally the same, whether it was just the  
11 Illinois River or all six of them.

12 Q. But as for reporting it here in response to  
13 the request that had been made to the OWRB, the  
14 entirety of that cost is being attributed here to the  
15 Illinois River?

16 A. That's correct. That's correct. We  
17 included all -- to say the opposite of that. We  
18 included the entire .037 criteria development process  
19 in our costs today, response costs today.

20 MS. LONGWELL: Mr. Smithee, I have no  
21 further questions for you.

22 MS LLOYD: I don't have any questions.

23 MR. LENNINGTON: We don't have any  
24 questions.

25 MS. HILL: All right.